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No. 84-1313

In the Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

RONALD K. COSBY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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March 28, 1985

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Come now Respondents and respectfully object to the Motion for Leave to File a Brief *Amicus Curiae* by the Association of American Railroads (hereinafter "AAR") in support of the Petition for a Writ of Certiorari filed by Burlington Northern Railroad Company (hereinafter "Petitioner" or "BN") pursuant to Rule 36.3 and respectfully state as follows:

SUMMARY OF OBJECTION

AAR filed its Motion in support of the Petition and Motion for Leave to File a Brief *Amicus Curiae* on March 18, 1985. Rule 36.1 requires a motion to be filed prior to the brief in opposition to the Petition for Certiorari. In this instance, the brief in opposition was filed by Respondents on March 15, 1985, therefore, AAR's motion is untimely.

Rule 36.3 further requires a motion for leave to file a brief *Amicus Curiae* to concisely "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case." AAR fails to set forth the facts or questions of law which it believes may not have been presented by the Petitioner nor any reasons for believing that they will not be adequately presented by the Petitioner. The Petitioner is a giant in the rail industry and has the financial ability and competent counsel necessary to present all issues to this Court. AAR is a trade association of railroads of which BN is one of the larger members. In the Respondents' view and after reading the proposed brief of AAR, no issues of fact or law are raised in AAR's motion or brief which are substantially different from what has been stated by Petitioner.

AAR has omitted one very critical factor from its allegations of national transportation importance. That critical factor is the existence of the "ancillary or supplemental to rail service" restriction contained in the operating authority of Respondents' ex-employer. The Eighth Circuit's Order relied heavily on the existence of that restriction. Consequently, the national implications alleged

by AAR do not exist. AAR should know the Interstate Commerce Commission (hereinafter "I.C.C.") has issued a Decision in another rail merger proceeding since the *Cosby* decision was rendered by the Eighth Circuit, wherein employee protection for employees of motor carrier subsidiaries was requested. The I.C.C. denied that request on the basis of the non-existence of the restriction found in this case and specifically distinguished this case from others where no such restriction exists. A copy of the pertinent portions of that order relating to employee protective conditions is attached hereto as Appendix 1.

Respondents withheld consent to the filing of an *Amicus Curiae* brief by AAR for these reasons and ask the Court to deny the motion of AAR.

ARGUMENT IN SUPPORT OF OBJECTION

Rule 36.1 provides that a motion for leave to file an *Amicus Curiae* brief when consent has been refused is not favored. Respondents refused to consent to *Amicus Curiae* intervention by AAR for several reasons. First, in Respondents' opinion, the request was not timely made. The Eighth Circuit Order from which the Petitioner seeks review was issued August 22, 1984. Petitioner requested and was granted an extension of time for filing its Petition over Respondents' objections. AAR sought consent a week before Respondents' brief was due. By that time, the Petition had been filed and Respondents' brief in opposition to the Petition was virtually completed. The Petitioner is one of the largest members of AAR and Respondents viewed this last minute attempt as a dilatory tactic.

Second, AAR is a trade association of the railroad industry and Petitioner is one of its largest members. As

such, Respondents believe AAR is simply the alter ego of the Petitioner and its arguments will simply restate matters argued by Petitioner.

Notwithstanding the withheld consent, AAR filed its motion and brief on March 18, 1985. Rule 36.3 provides the motion must be filed within the time limits of 36.1. That Rule states the motion must be filed within the time allowed for the filing of the motion to dismiss or affirm or the brief in opposition to the Petition for Certiorari. Respondents' brief in opposition to the Petition for Certiorari was filed March 15, 1985. Consequently, AAR's motion is out of time.

AAR's motion further fails to comply with the requirement of Rule 36.3 by not concisely stating the facts or questions of law which have not been, or the reasons for believing that they will not adequately be, presented by the parties to the proceeding. AAR's motion is devoid of those substantive allegations. Respondents believe the reason is obvious. Petitioner is a giant corporation which has sufficient financial resources and competent counsel for setting forth all arguments.

AAR only submits it will assist the Court in resolving the case by providing information the parties cannot provide on what the decision below means in terms of current events and future developments in the railroad industry. This argument completely overlooks the fact that in the underlying case, the BN motor carrier subsidiary was limited to providing motor carrier service which was "ancillary and supplemental to rail service". As cited in Respondents' brief in opposition to the Petition, this historic need for such a restriction no longer exists. In other words, there is now no impediment to a railroad obtaining unrestricted motor carrier rights. The I.C.C. has already

ruled on the issue of employee protective conditions for motor carrier employees involved in a rail acquisition since the *Cosby* decision of the Eighth Circuit.[1] In that case the motor carrier subsidiary was not restricted to ancillary and supplemental service and the I.C.C. distinguished that case from the subject case on that ground. In Respondents' view, AAR's allegation of impending devastation to the rail industry is unfounded. The pertinent portions of the I.C.C. Decision in that case are attached hereto as Appendix 1. A review of that Decision by the I.C.C. clearly indicates that the dramatic effect of the Eighth Circuit Order in *Cosby* as alleged by AAR is farfetched.

CONCLUSION

For the reasons stated above, Respondents respectfully object to the Motion of the Association of American Railroads.

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March 28, 1985

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1. *Chicago, Milwaukee, St. Paul and Pacific Railroad-Reorganization-Acquisition by Grand Trunk Corporation*, Finance Docket No. 28640 (Sub-No. 9).

APPENDIX

APPENDIX 1

[Service Date January 11, 1985]

THIS DECISION WILL BE INCLUDED IN THE BOUND VOLUMES OF THE ICC PRINTED REPORTS INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28640 (Sub-No. 9)[1]

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY-REORGANIZATION-ACQUISITION BY GRAND TRUNK CORPORATION

OPEN CONFERENCE VOTING DATE: DECEMBER 20, 1984

Decided: January 8, 1985

1. In Finance Docket No. 28640 (Sub-No. 9), the Trustee's Amended Plan of Reorganization for MILW[2] approved in the Commission's decision served September 26, 1984 is not modified at this time. However, in the event of the court's approval of the CNW proposal, further approval of the modification by this agency will not be required.

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1. This decision embraces the proceedings listed in Appendix B of the September 26th decision. Also embraced are Finance Docket No. 28640 (Sub-No. 9CC), *Chicago and North Western Transportation Company and Mid-American Rail Properties, Inc. - Exemption - Securities* and Finance Docket No. 30479, *Chicago and North Western Transportation Company - Bonds and Exemption from Competitive Bidding.*

2. See Appendix A of the September 26th decision for abbreviations.

2. In Finance Docket No. 28640 (Sub-Nos. 9C and Q), CNW's and MARP's modified acquisition proposal is approved subject to conditions.

3. In Finance Docket No. 28640 (Sub-No. 9D), CNW's exemption request to acquire stock control and lease and operate lines acquired by MARP is approved.

4. In No. MC-F-15231 (Sub-No. 1) CNW's and MARP's exemption request to acquire control of MMT is approved.

5. In Finance Docket No. 28640 (Sub-No. 9E), CNW and MARP's exemption request to construct and operate a rail line between Seymour and Allertown, IA, is approved.

6. In Finance Docket No. 28640 (Sub-Nos. 9S and CC), CNW and MARP's exemption request for issuance of securities and assumption of obligations is approved.

7. In Finance Docket No. 28640 (Sub-No. 9L), jurisdiction is reserved on GBW's request for trackage rights in response to CNW's modified proposal. GBW's request for conditions in response to Soo's conditions is denied.

8. In Finance Docket No. 28640 (Sub-No. 9V): (a) Soo is granted trackage rights: (1) on CNW's Spine Line between Kansas City, MO and Northfield, MN; (2) between Appleton and Green Bay, WI; and (3) in the vicinity of Milwaukee, WI; and (b) jurisdiction is reserved to impose trackage rights between Sheldon and Muscatine, IA. The remaining conditions sought by Soo to CNW's modified proposal are denied.

9. In Finance Docket No. 28640 (Sub-No. 9W), the trackage rights sought by GTC, DWP, and GTW to the CNW's modified proposal are denied.

* * *

[-16-]* jurisdiction over negotiated agreements to assure that they conform with proper standards.[23]

2. *MMT employees.* The employees of MMT request that we impose protective conditions for their benefit similar to those imposed for employees of rail carriers under 49 U.S.C. 11347. Although employees of rail carriers are entitled to protection under the statute, the imposition of protective conditions for motor carrier employees is a matter solely within our discretion. 49 U.S.C. 11344. Historically, the treatment of these employees has been dissimilar. *American Buslines, Inc. v. United States,* 253 F. Supp. 481 (D. D.C. 1966), *aff'd per curiam,* 385 U.S. 38 (1966), recognized that motor carrier employees do not need the same degree of protection as rail employees. The court noted that the skills of motor carrier employees are more adaptable than those of railroad employees, and that the area of available employment is greater in the motor carrier industry than in the railroad industry. This situation remains the same today.

Notwithstanding this, the MMT employees cite *Cosby v. ICC, supra,* where the court held that the protective provisions of 49 U.S.C. 11347 applied to the employees of a motor carrier. There, the motor carrier was dissolved when its rail parent was merged into another railroad that had its own motor carrier subsidiary. In our opinion *Cosby* is factually inapposite and in dicta it misinterprets the applicable law.

The Interstate Commerce Act was recodified on October 17, 1978. Pub. L. No. 95-473, 92 Stat. 1337. Section

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*Printer's Note: Page numbers in brackets represent original pages of Decision.

23. We note that Soo also entered similar agreements with some of MILW's unions.

5(2)(f) was recodified as 49 U.S.C. 11347, and section 5(2)(b) was recodified as 49 U.S.C. 11344(b). In *Cosby*, the court stressed that, in recodifying section 5(2)(b), Congress changed "rail carrier employees" to "carrier employees" [49 U.S.C. 11344(b)(1)(D)], and, therefore, found that protection of all employees was required. This reading of the recodification totally and inaccurately ignores section 3 of the recodification, which states that "Sections 1 and 2 of this Act restate, without *substantive change*, laws enacted before May 16, 1978 . . . ." (emphasis added), section 3(a) of Pub. L. No. 95-473, 92 Stat. 1466. Hence, no substantive change in the statute was made that requires us to protect motor employees and as we held in our September 26th decision, it remains in our discretion to grant or deny protection to the employees of motor carrier subsidiaries. Indeed, the Eighth Circuit's statutory analysis appears to be only dicta because the court places primary reliance on the factual circumstances that in the court's view make it an abuse of discretion for the Commission to deny labor protection to the motor carrier employees in that case. We now turn to the equitable arguments raised by MMT's employees in urging us to exercise our discretion to protect them.

In *Cosby*, the St. Louis-San Francisco Railway Company (Frisco) was merged into BN.[24] Both railroads owned a motor carrier subsidiary with operating rights restricted to auxiliary-to-rail service. After the rail merger, BN expanded the operations of its subsidiary and dissolved the Frisco subsidiary, Frisco Transportation Company (FTC). The court held that, since the FTC's operations were, in fact, auxiliary to and supplemental

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24. *See Burlington Northern, Inc. - Control & Merger - St. L.*, 360 I.C.C. 784 (1980).

of the Frisco rail operations, the motor carrier was a part of the rail carrier's single transportation system. Further, it held that, since the FTC's operations were intimately tied to the railroad's main transportation function, the employees were [-17-] considered railroad employees and were entitled to the protection accorded by 49 U.S.C. 11347. The court distinguished *American Buslines* and similar cases on the grounds that those decisions did not involve motor carrier subsidiaries of railroads that exclusively operated auxiliary-to-rail services.

Here, the operating authority of MMT is not completely restricted to auxiliary-to-rail service, nor are its operations exclusively auxiliary to or supplemental of MILW. Although a substantial portion of its revenues are attributable to MILW's business, it conducts significant non-rail related transportation operations throughout other States. Thus, MMT cannot be considered a part of the MILW's single transportation system in the same manner as FTC was considered a part of the Frisco's system. Moreover, the fact that MMT employees do provide nonrail related motor transportation indicates that their skills are generally transferable to the general motor carrier industry, a point not evident in *Cosby*. See *Cosby v. ICC, supra,* 741 F.2d at 1081. There are certain areas where there is a coordination of effort between MILW's and MMT's personnel; however, these are primarily nontransportation functions, and such efficiencies of operation in administrative matters do not render MMT an integral part of the MILW's rail transportation system.

Until now, there has been no indication that MMT employees were ever considered to be railroad employees. During the reorganization, the Trustee required railroad employees to participate in a wage reduction program.

The MMT's employees, however, were not required to bear that burden of the railroad's reorganization. The MMT's employees were treated differently from MILW's railroad employees.

Moreover, in *Cosby,* the court was particularly concerned about the equities of the situation. During the BN-Frisco proceedings before this Commission, the senior management indicated that protection would be afforded any employees affected by the merger. The court considered that those promises may have influenced the FTC's employees not to participate in the proceedings and seek protection. Therefore, it concluded that FTC's employees were entitled to the protection of the statute.

In this proceeding, no such promises have been made. Indeed, they appear unnecessary, since MILW's prospective purchasers indicate that the operations of MMT will not be modified. We find nothing in the record to indicate that this is not so.

Since the facts of this case are distinguishable from *Cosby* and the MMT employees have not demonstrated a need for the imposition of conditions for their protection, their request is denied.

3. *UTU Local 528 conditions.* UTU Local 528 requests conditions that would ultimately benefit CNW's and MILW's employees.

The first condition would require CNW to acquire MILW's property used in commuter operations and obligate CNW to perform certain operations in connection with commuter service. This condition would benefit carrier employees on lines used for commuter service. We rejected a similiar condition on page 58 of the September 26th decision as being unnecessary. CNW's asset purchase

agreement provides it would acquire the property used for commuter operation; CNW also agreed to assume MILW's operating responsibilities. We deny this condition as superfluous. Moreover, whether RTA should continue providing the commuter service or CNW should undertake the service is a matter of private agreement between RTA and MILW and its successor particularly where the instant consolidation has nothing to do with the RTA's undertaking of the commuter operation.

* * *